United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF AND APPENDIX

75-4064

To be argued by:

JULES E. COVEN, ESQ .

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

CHENG, SAU FU	(A15 655 605)
YEUNG, KO NARN	(A15 928 014)
LAM, SIN WAI	(A15 998 590)
CHIU, KAM MUK	(A18 059 999)
LI, KWONG PAN	(A19 661 999)

Petitioners,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

- -x

DOCKET NO. 75-4064

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P/S

BRIEF AND APPENDIX

ON BEHALF OF

PETITIONERS

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Of Counsel

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UNITED STATES COURT OF APPEALS
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BRIEF OF PETITIONERS

PRELIMINARY STATEMENT

The petitioners seek review of an Order of the Board of Immigration Appeals dated March 14, 1975 finding that the petitioners were deportable from the United States and denying the petitioners' application to have their proceedings terminated. The jurisdiction of this Court in this matter is pursuant to the provisions of Public Law 87-301, 8 U.S.C. 1105(a).

STATUTES INVOLVED

Section 101(a)(13) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 provides:

> "The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise.....

Section 235(a) 8 U.S.C. 1225:

> "The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States.....

Section 236(a) 8 U.S.C. 1226:

> "A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and crossexamine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 235 shall be allowed to enter or shall be excluded and deported.....

QUESTIONS INVOLVED

1. DID THE PETITIONERS MAKE AN ENTRY INTO THE UNITED STATES SUFFICIENT TO CAUSE THEM TO BE PLACED UNDER DEPORTATION PROCEEDINGS, RATHER THAN EXCLUSION PROCEEDINGS?

2. DOES THE IMMIGRATION OFFICER AT THE BORDER HAVE THE RIGHT TO DETERMINE WHETHER AN ALIEN IS TO BE AFFORDED A DEPORTATION HEARING OR AN EXCLUSION HEARING?

3. DID THE ALIENS EVADE INSPECTION AND WERE THEY FREE FROM ACTUAL OR CONSTRUCTIVE RESTRAINT AFTER THEY CROSSED THE INTERNATIONAL BORDER LINE?

THE FACTS

The petitioners are all natives and citizens of China. Their attempt to elude inspection and examination was aborted when they were apprehended by the Immigration Service while they were attempting to enter the United States within one mile of the Canadian Border, and within minutes after they crossed the international border line.

The facts were agreed to by both sides before the Immigration Judge and before the Board of Immigration Appeals. A diagram of the roads near where the aliens attempted to enter this country is included in the appendix. The facts which were agreed to were basically included in the affidavit of an officer of the Immigration Service.

On or about 3 A.M. on September 23, 1975, John Lovejoy, a chief Patrol agent was stationed near the Canadian border. He was at an intersection, four-tenths of a mile from the international border line. The intersection is known as the Bradley and Durham Road intersection. Bradley Road is a road that leads from Canada to the United States. Mr. Lovejoy was stationed at that part of the Bradley Road which is within territorial limits of the United States. Mr. Lovejoy's affidavit stated that he heard a vehicle pass the intersection, but he saw no lights. After the vehicle

or van passed the intersection, the lights were turned on. The officer then proceeded to follow the car for approximately one mile. He stopped the vehicle when it made a turn into a road off Bradley Road (which incidentally was a dead end). The aliens were arrested at that time.

Mr. Lovejoy, the agent, stated in his affidavit that he was following a vehicle in which the aliens were secreted in order to see if the car was going to the inspection station. He further went on to say that if the van deviated from the posted route to the inspection station, the van's occupants were no longer seeking to be inspected. After the aliens were arrested, they were brought to the inspection station and were placed under deportation proceedings.

From the affidavit of Mr. Lovejoy and from the diagram that is annexed to the appendix, it is considered that the correct way to go to the inspection station would be to continue south on Bradley Road to Monument Road. At the Monument Road intersection there is a sign which directs persons to the inspection station, which is to the west and north of Bradley and Monument Roads. The driver of the van, on September 23, 1975, is not a party to these proceedings, but he had previously been stopped on another day when he was on the Monument Road. However, he returned immediately to Canada without ever having gone to the inspection station,

and without any proceedings having been brought against him at that previous time.

In addition to being placed under deportation proceedings, the aliens were criminally charged with a violation of Title 8, U.S.C. Sec. 1326, in that they had previously been arrested and deported from the United States, and attempted to re-enter without gaining advanced permission of the Attorney General which is required of aliens deported from the United States. (They were sentenced to a jail term).

After their guilty pleas, the aliens were afforded a joint hearing in deportation. At that hearing, objection was made to the institution of deportation proceedings on the grounds that the aliens had not made an entry into the United States, and therefore, deportation proceedings were improper. The argument made by the aliens was that since they were stopped while attempting to enter the United States, and before they eluded inspection and examination, they therefore, should have been placed under exclusion proceedings. The Immigration Judge found that they had made an entry into the United States, as defined in U.S.C. 1101(a)(13). This decision was appealed to the Board of Immigration Appeals where the decision was affirmed.

This petition seeks review of the determination of the Board of Immigration Appeals which was contrary to other decisions of the Board and Courts with reference to the propriety of commencing deportation proceedings where the proper proceedings were exclusion proceedings.

ARGUMENT

POINT I

EXCLUSION PROCEEDINGS AND DEPORTATION PROCEEDINGS ARE MUTUALLY EXCLUSIVE

The question as to whether an alien is entitled to receive a hearing in deportation pursuant to Sec. 242 8 U.S.C. 1252, or whether he is subject to the exclusion statutes of the Immigration Law, Sec. 8 U.S.C. 1225-1226-1227, has, in the past raised significant legal questions that are very basic to the enforcement of the Immigration statutes of the United States. It has been determined that a person who is stopped at our border and whose admissibility into the United States is in question, shall be considered to be an applicant for admission, and afforded a hearing under the exclusionary statutes of the United States. If he was paroled into the United States to receive such a hearing he would be considered an applicant for admission and would still receive an exclusion hearing, rather than a deportation hearing. (See Klapholz v. Esperdy, (201 F. Supp. 294

(S.D.N.Y.,1961), affirmed per curiam 302 F.2d 928, certiorari denied 371 U.S.891 (1962) and Ma v. Barber, 357 U.S. 185 (1958).

If a person has made an entry into the United States, thereby being admitted or entering without inspection, or by eluding inspection, then he is subject to deportation from the United States, and the deportation statutes, Sec.8 U.S.C. 1252-1253 are effective. There are differences in the effect of a person being ordered excluded from the United States, and a person who is ordered deported from the United States. Persons excluded cannot make applications pursuant to Sec. 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h). See Ma v. Barber, 357 U.S. 185 (1958).

The place where an excluded alien can be sent to is limited by our exclusion statutes. A person who is paroled into the United States for an exclusion hearing can also make certain applications which are not available to persons who have entered without inspection, or who have eluded inspection and examination. A person paroled into the United States for an exclusion hearing can make an application pursuant to 8 U.S.C. 1255 of the Immigration and Nationality Act. That is, he may apply to adjust his status to that of a permanent resident. Thus, we can see that whether an alien is subject to our exclusion statutes or

deportation statutes is important to the alien. In the instant case, the aliens suffer a substantial harm by being placed in deportation proceedings.

POINT II

THE ALIENS DID NOT MAKE AN ENTRY INTO THE UNITED STATES SINCE THEY HAD NOT ACTUALLY INVADED INSPECTION AND THEY WERE NOT FREE FROM RESTRAINT.

One of the best analysis of the question as to whether or not an alien has made an entry into the United States is included in a decision made by the Board of Immigration Appeals on October 5, 1973, matter of Pierre et al, Interim Decision 2238: The Board basically held that an alien has not effected an entry into the United States, unless while free from actual or constructive restraint, he has crossed into the territorial limits of the United States and has been inspected and admitted by an immigration officer or has actually and intentionally evaded inspection at the nearest inspection point.

The Board further went on to say, in analyzing this matter:

"The courts have found it necessary to interpret the term "entry," which is now defined in section 101(a)(13) of the Act as "... any coming of an alien into the United States, from a foreign port or place or from an outlying possession...." A survey of the many cases which have treated this subject over the years leads to the following conclusion: An "entry" involves (1) a crossing into the territorial limits of the United States, i.e. physical presence; plus (2) inspection and admission by an immigration officer, United States v. Vasilatos, 209 F.2d 195 (3 Cir. 1954); Lazarescu v. United States, 199 F.2d 898, 900 (4 Cir. 1952); or (3) actual and intentional evasion of inspection at the nearest inspection point, U.S. ex rel. Giacone v. Corsi, 64 F.2d 18 (2 Cir. 1933); Morini v. United States, 21 F.2d 1004 (9 Cir. 1927), cert. denied 276 U.S. 623 (1928); Lew Moy v. United States, 237 Fed. 50, 52 (8 Cir. 1916); Matter of Estrada-Betancourt, 12 I&N Dec. 191, 193-4 (BIA 1967); Matter of Albuerne-Urquiza, A17 334 264, unreported decision (BIA October 12, 1967); coupled with (4) freedom from restraint, United States v. Vasilatos, supra; Lazarescu v. United States, supra. In all of the above cases these conditions were satisfied and an entry was effected.

(A copy of this interim decision is included in the appendix. This is done, in view of the fact, that this decision is not, as yet, in the Bound Volumes of the Administrative Decision under Immigration and Nationality Laws of the United States).

In the instant case, the only element of an entry that would satisfy the rules laid down by the Court would be that the aliens crossed into the territorial limits of the United States. Obviously, from the facts, they did not evade inspection since the Border Patrol Officer was waiting on the road to the inspection station; nor were they free from actual or constructive restraint. Therefore, they did not make an entry into the United States as defined in Sec. 8 U.S.C. 1101(a)(13) of the Immigration and Nationality Act.

The case of Ex parte Chow Chok, 161 Fed. 627, aff'd 163 Fed. 1021 (2 Cir. 1908) is very similar to the case at bar. In that case the alien was under surveillance when he entered the United States. He did not know that he was being watched. In addition to this fact, he crossed the border with the intention of evading inspection, however, the Court held that in view of the fact that he was not free to go and mix with the population, he had not made an entry, and, therefore, exclusion proceedings were the proper proceedings. It is interesting to note that the intention of the alien in that case was not material.

In the instant case, the judge indicated that since the aliens intended to evade inspection, an entry was

effected when they crossed the territorial boundary line. It is the opinion of the writer that this is not the law nor has ever been the law. For example, if a person comes to the actual border station and rather than stopping for inspection breaks through the fence and is apprehended after a short chase; such a person could not be considered to be a person who has effected an entry to warrant his being placed under deportation proceedings. If the Immigration Judge and Board were correct, every person who arrives at a port with intent to sneak through the inspection station would have made an entry at the time he intends to evade. Stowaways who are detained before they leave the vessel upon which they arrived at a United States port are not placed under deportation proceedings.

The aliens in the case at the bar should not have been placed under deportation proceedings. They did not make an entry because they were apprehended while attempting to enter the United States. The only reason that deportation proceedings were commenced is because it was convenient for the government to treat these cases in this matter.

It is clear that the aliens were not successful in evading inspection at the nearest inspection point when they entered the United States. It is also clear that the aliens were never free from restraint; and it is quite clear

that as a matter of law, no entry was made. Therefore, the deportation proceedings were improper and the subsequent deportation order invalid.

CONCLUSION

WHEREFORE, it is respectfully requested that the Court rule that the decision of the Immigration Service is in error; that the order of deportation be set aside and the deportation proceedings terminated, and that the Immigration Service be directed to proceed against the aliens pursuant to the exclusion statutes of the United States.

Respectfully submitted,

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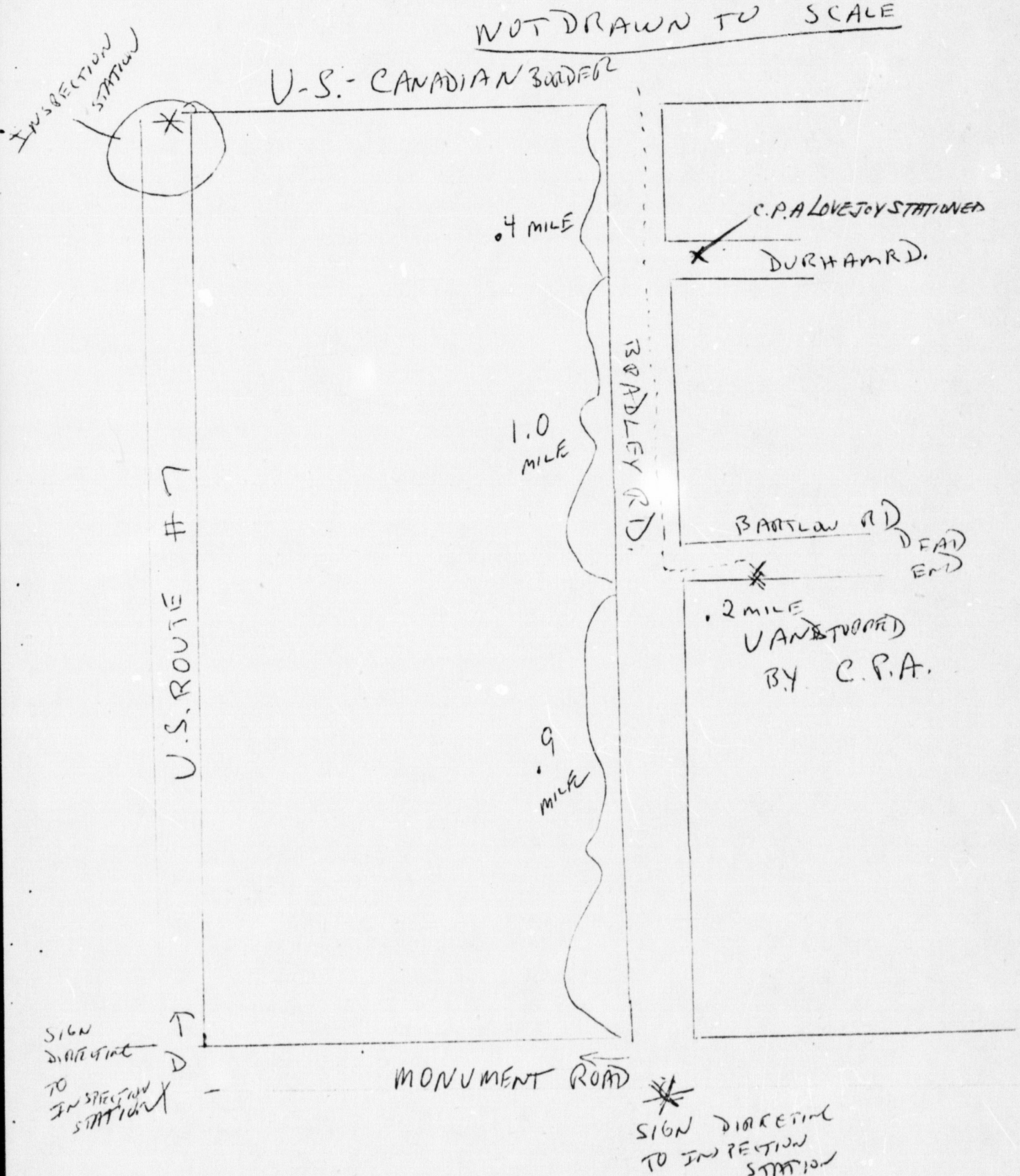
JULES E. COVEN
Of Counsel


NOT DRAWN TO SCALE
U.S. - CANADIAN BORDER
INSPECTION STATION
U.S. ROUTE #7
.4 MILE
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DURHAM RD.
BARTLOW RD
DEAD END
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BY C.P.A.
SIGN DIRECTING TO INSPECTION STATION
MONUMENT ROAD
SIGN DIRECTING TO INSPECTION STATION

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

Files: A15 665 605 - New York
A16 027 708
A15 928 014
A15 998 590
A18 059 999
A19 661 999

MAR 14 1975

In re: CHENG SAU FU
WONG TUNG SING
YEUNG KO KARU
LAM SIN WAI
CHIU KAM MUK
LI-KWONG PAN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Jules E. Coven, Esq.
Lebenkoff & Coven
One East 42nd Street
New York, New York 10017

ON BEHALF OF I&N SERVICE: Paul C. Vincent
Appellate Trial Attorney

ORAL ARGUMENT: August 15, 1974

APPLICATION: Termination of proceedings

These cases present an appeal from a decision of the immigration judge dated April 26, 1974 finding the respondents deportable as charged and ordering their deportation to the Republic of China and alternatively to Hong Kong. The appeal will be dismissed.

A15 665 605, et al.

The respondents, aged 42, 39, 50, 29, 33 and 34, respectively, are all natives and citizens of China, who allegedly entered the United States near Highgate, Vermont, on or about September 23, 1973 without presenting themselves for inspection by an immigration officer. The respondents had been previously arrested and deported from the United States and had not obtained the consent of the Attorney General to reapply for admission. The respondents concede their prior deportations and failure to obtain permission to reapply for admission. The respondents deny making an entry.

Our review of the record as well as contentions advanced during oral argument, satisfies us that the hearing was fair, that deportability has been established by evidence that is clear, convincing and unequivocal. We agree with the immigration judge that the respondents made an entry as defined in section 101(a)(13) of the Immigration and Nationality Act. We find that deportation proceedings are appropriate under the facts in this case. Accordingly, we shall affirm the decision of the immigration judge and dismiss the appeal.

ORDER: The appeal is dismissed.

Chairman

LJM/bc

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

Files: A15 665 605 - New York
A16 027 706 - " "
A15 923 014 - " "
A15 923 500 - " "
A18 050 999 - " "
A19 001 999 - " "

In the Matter of

CHENG SAU FU
WONG TUNG SING
YEUNG KO KARU
LAM SIN WAI
CHIU MAN YUK
LI-KWONG PAN

Respondents

APR 2 0 1974

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act - Section 241(a)(1) - aliens excludable having been arrested and deported - no permission to reapply having been granted under Section 212(a)(16) of the Act.

APPLICATION: Termination of Proceedings.

In Behalf of Respondents:

Lebenhoff & Coven, Esqs.
Jules Coven, Esq., of counsel
One East 42nd Street
New York, N. Y. 10017

In Behalf of Service:

Allan A. Chaden, Esq.
Trial Attorney
New York, N. Y. 10007

DECISION OF IMMIGRATION JUDGE

The respondents, aged 42, 39, 30, 29, 33, 34 respectively, are all natives and citizens of China who allegedly entered the United States near Highgate, Vermont on or about September 23, 1973 without presenting themselves for inspection by an immigration officer. The respondents

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had previously been arrested and deported from the United States and had not obtained the consent of the Attorney General to reapplying for admission. The respondents concede their prior deportations and failure to obtain permission to return. However, they deny making an entry on or about September 23, 1973 and further deny not being inspected by an immigration officer. The respondents refused to designate a country of deportation. I have directed the Republic of China or, in the alternative, Hong Kong as the country of deportation. Respondents' sole application is for termination of proceedings.

The sole question to determine is whether the respondents made an entry into the United States. It is clear that if they did not effect an entry into this country, exclusion proceedings should have been brought, whereas, if an entry was made, the current proceeding is a proper one. The word entry is defined in Section 101(a)(13) of the Immigration and Nationality Act (8 USC 1101(a)(13)) as ". . .any coming of an alien into the United States, from a foreign port or place . . ." An entry involves a crossing into the territorial limits of the United States in addition to inspection and admission by an immigration officer, U.S. v. Vasilatos, 209 F. 2d 195, 197, or actual and intentional evasion of inspection at the nearest inspection point, U.S. ex rel. Giacone v. Corsi, 64 F. 2d 18; Matter of Estrada-Betancourt, 12 I&N Dec. 191, 193-4; see Matter of Pierre et al. Int. Dec. 2238, dated October 5, 1973; coupled with freedom from restraint, U.S. v. Vasilatos, supra.

In the instant case the evidence is clear that the respondents physically crossed the border of the United States and were not inspected by an

immigration officer.

The underlying issue is whether the respondents intended to present themselves for inspection. The stipulated facts indicate that the respondents, after crossing the border, headed in the direction of the inspection point, but then turned off on a side road where they were apprehended by immigration officers. It has been held that when an alien crosses the border, intends to present himself for inspection and follows the ordinary path from the international line to the nearest inspection point, he has not effected an entry. Thack v. Dimbrick, 51 F. 2d 634, 635-6. The respondents in the instant case clearly intended to avoid inspection at least from the time they crossed the international line. They had no entry documents of any kind, had all been previously deported and no permission to apply or reapply for admission was ever sought or granted (see Section 212(a)(17) of the Immigration and Nationality Act, 8 USC 1182(a)(17)) and were all passengers in a vehicle which contained devices to avoid detection by the Immigration and Naturalization Service. In fact, the driver of the vehicle had made a previous crossing of the border at the same place a few days earlier. The state police observed him trying to use the aforementioned devices, and after being told he was lost, was escorted in the direction of the inspection station when he took off in the direction of Canada and was lost by the police. In addition, instead of proceeding directly from the border to the nearest inspection station, they turned off one side road.

The cases of Ex parte Chow Chok, 161 F. 627 and U. S. v. Yuen Pak Sung, 169 F. 260 hold that aliens who were under continuous observation before crossing the international line, while crossing it, and thereafter while proceeding to a point in the United States where it became evident that they did not intend to be inspected at the nearest inspection station, were properly the subject of exclusion proceedings because they never enjoyed any freedom from official restraint. This was not true in the present case where the surveillance did not take place until the respondents had crossed the international line and were .4 miles beyond it.

All the evidence of record calls for the conclusion that the respondents, from the time the border was crossed, intended to avoid inspection and actually evaded inspection. Therefore, an entry was clearly effected when they crossed the international line having no intention to be inspected or when they turned off a side road in a direction other than the inspection point. Accordingly the respondents are properly the subjects of expulsion proceedings for having entered without inspection.

The respondents all pleaded guilty to a violation of Section 1326, Title 8 of the United States Code in that they had previously been arrested and deported from the United States and reentered or attempted to reenter the United States (underlining supplied) see Exhibit 3 - transcript of court record. The respondents claim their plea of guilty was only to attempting to reenter the United States, not to reentering. I have considered this point and still find that all the respondents entered the United States

as alleged on the Orders to Show Cause; all allegations were proven by the Service by clear, convincing and unequivocal evidence.

ORDER: IT IS ORDERED that the respondents be deported from the United States to the Republic of China on Formosa on the charge contained in the Orders to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondents into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondents into its territory, the respondents shall be deported to Hong Kong.

Howard I. Cohen

HOWARD I. COHEN
Immigration Judge

MATTER OF PIERRE et al.

In Exclusion Proceedings

A-20182758-763

Decided by Board October 5, 1973

(1) An alien has not effected an entry into the United States unless, while free from actual or constructive restraint, he has crossed into the territorial limits of the United States and has been inspected and admitted by an immigration officer or has actually and intentionally evaded inspection at the nearest inspection point.

(1) Respondents, Haitian refugees, who, upon arrival at the port of West Palm Beach, Florida, remained on board their vessel awaiting inspection by immigration officers but who were not admitted by such officers, did not make an entry into the United States. Consequently, exclusion proceedings are proper in their cases and relief under section 243(h) of the Immigration and Nationality Act, as amended, is, therefore, unavailable to them.

EXCLUDABLE: Act of 1952 - Section 212(a)(20) [8 U.S.C. 1182(a)(20)] - Immigrants - no visas.

ON BEHALF OF APPLICANTS:
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ON BEHALF OF SERVICE:
Irving A. Appleman
Appellate Trial Attorney

The aliens, hereafter referred to as "applicants," appeal from the May 24, 1973 decision of the immigration judge in which he found them excludable under section 212(a)(20) of the Immigration and Nationality Act, and refused to hear their claims of persecution under section 243(h) of the Act. The appeal will be dismissed.

The principal question to be decided is whether these cases are properly in exclusion rather than deportation proceedings. The applicants are all natives and citizens of Haiti. They left Haiti in a small boat, which fell into distress and was towed into West Palm Beach, Florida, a designated port of entry, 8 C.F.R. 100.4(c)(2), by an American vessel on May 20, 1973. Upon being questioned, they informed the captain of the American vessel that they had no entry documents. Then they waited on board for the arrival of immigration officers in the hope of being allowed to remain in the United States as political refugees. Because they did not appear to the immigration officers to be clearly and beyond a doubt entitled to land, the matter was referred to the immigration judge for further inquiry in accordance with section 235(b) of the Act. The applicants were held in custody until June 15, 1973, when they were paroled in the custody of a group of ministers. Their applications for political asylum were denied by the District Director after he had consulted with the Office of Refugee and Migration Affairs of the Department of State.

The applicants contend that they should be heard in deportation (i.e. expulsion) rather than exclusion proceedings. Therefore, the key question is whether or not

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an entry was made, since it is clear that if they did not effect an "entry" into this country, exclusion proceedings were proper, whereas the proceedings must be in deportation if the aliens made an "entry."

Section 291 of the Immigration and Nationality Act provides that any person who applies for admission to the United States must establish that he is not subject to exclusion. An alien who has effected an entry is not subject to exclusion, but rather to deportation. Section 291 further provides that in deportation proceedings the respondent must bear the burden of showing the time, place, and manner of his entry into the United States. It follows, therefore, that the responsibility for establishing whether an entry has been made rests on the alien.

The courts have found it necessary to interpret the term "entry," which is now defined in section 101(a)(13) of the Act as ". . . any coming of an alien into the United States, from a foreign port or place or from an outlying possession . . . ." A survey of the many cases which have treated this subject over the years leads to the following conclusion: An "entry" involves (1) a crossing into the territorial limits of the United States, i.e. physical presence; plus (2) inspection and admission by an immigration officer, United States v. Vasilatos, 209 F.2d 195 (3 Cir. 1954); Lazarescu v. United States, 199 F.2d 898, 900 (4 Cir. 1952); or (3) actual and intentional evasion of inspection at the nearest inspection point, U.S. ex rel. Giacone v. Corsi, 64 F.2d 18 (2 Cir. 193[illegible]; Morini v. United States, 21 F.2d 1004 (9 Cir. 1927), cert. denied 276 U.S. 623 (1928); Lew Moy v. United States, 237 Fed. 50, 52 (8 Cir. 1916); Matter of Estrada-Betancourt, 12 I&N Dec. 191, 193-4 (BIA 1967); Matter of Albuerne-Urquiza, A17 334 264, unreported decision (BIA October 12, 1967); coupled with

(4) freedom from restraint, United States v. Vasilatos, supra; Lazarescu v. United States, supra. In all of the above cases these conditions were satisfied and an entry was effected.

In contrast, the courts have held that no entry is made when the alien is taken into custody upon his arrival at an American port (even though he may possess a valid immigrant visa), Klapholz v. Esperdy, 302 F.2d 928, 929 (2 Cir.), cert. denied 371 U.S. 891 (1962). There is no entry when the alien is under official restraint, even after his ship has arrived at port and he has been inspected and given a conditional landing permit, In re Dubbiosi, 191 F. Supp. 65, 66 (E.D. Va. 1961). The restraint may take the form of surveillance, unbeknownst to the alien; he has still not made an entry despite having crossed the border with the intention of evading inspection, because he lacks the freedom to go at large and mix with the population, Ex parte Chow Chok, 161 Fed. 627, 629-30, 632 (N.D.N.Y.), aff'd 163 Fed. 1021 (2 Cir. 1908).

Parole is not an admission, section 212(d)(5), Immigration and Nationality Act, and therefore does not constitute an entry, Leng May Ma v. Barber, 357 U.S. 185, 186, 188-90 (1958); Vitale v. INS, 463 F.2d 579, 582 (7 Cir. 1972); Siu Fung Luk v. Rosenberg, 409 F.2d 555, 558 (9 Cir.), cert. denied 396 U.S. 801 (1969); U.S. ex rel. Tom We Shung v. Murff, 176 F. Supp. 253, 256 (S.D.N.Y. 1959), aff'd 274 F.2d 667 (2 Cir. 1960). Moreover, when an alien crosses the border, intends to present himself for inspection, and follows the ordinary path from the international line to the nearest inspection point, he has not effected an entry, Thack v. Zurbrick, 51 F.2d 634, 635-36 (6 Cir. 1931). A fortiori

an entry is not made when an alien merely crosses into the territorial waters of the United States without landing and without evading inspection.

In the present case, the aliens arrived at port but did not land. Instead, they waited on board their vessel until they could be inspected by immigration officers. While they may have crossed into the territorial limits of the United States, they were not admitted by immigration officers, nor did they intentionally evade inspection. On the contrary, they requested inspection (Tr. p. 12). The captain of the American vessel had no authority to admit them. Indeed, he would have been subject to penalties if he had permitted them to land, sections 271 and 273, Immigration and Nationality Act.

Counsel relies heavily on Matter of Estrada-Betancourt, supra, in which we found that an entry had been made and that, therefore, deportation proceedings rather than exclusion proceedings were proper. The aliens in that case did not arrive at a "designated port of entry." We stated that they "were required to proceed by the ordinary route to the nearest such port for their inspection," and held that "when they evaded inspection at that place their 'entry' was effected and they were thereafter properly the subject of expulsion proceedings for having 'entered without inspection,'" id. at 194. That the applicants in the present case remained on board and waited for the immigration inspectors to come to them does not alter the fact that they did not evade or seek to evade inspection at the nearest inspection point.

Accordingly, we find that the applicants have not sustained their burden of establishing that an entry was made. In Beauvil v. Ahrens, 333 F.2d 307 (5 Cir. 1964), on substantially similar facts, the United States Court

of Appeals held that exclusion proceedings were proper. 1/ Consequently, we agree with the immigration judge that the proceedings are properly in exclusion, not in deportation.

Since these are exclusion proceedings, the immigration judge correctly refused to hear the applicants' claims of persecution under section 243(h) of the Act. That provision by its terms applies to aliens "within the United States" and not to those who, like the applicants, seek admission. Section 243(h) relief is thus unavailable to applicants in exclusion proceedings, Leng May Ma v. Barber, supra at 186; U.S. ex rel. Tom We Shung v. Murff, supra at 260.

Applicants for admission and excluded aliens have the alternative remedy of presenting evidence concerning feared persecution to the District Director and requesting parole pursuant to section 212(d)(5) and 8 C.F.R. 212.5(a). Cf. Glavic v. Beechie, 225 F. Supp. 24, 27 (S.D. Tex. 1963), aff'd 340 F.2d 91 (5 Cir. 1964) (where a crewman has the opportunity to seek parole under section 212(d)(5), a hearing under section 243(h) is not required by the Act). The applicants have availed themselves of this opportunity, but the District Director denied their requests for political asylum after consultation with the Office of Refugee and Migration Affairs, Department of State. Neither the immigration judge nor this Board is empowered to grant parole pursuant to section 212(d)(5) of the Act, Matter of Conceiro, Interim Decision 2183 (BIA 1973), aff'd Conceiro v. Marks, 360 F. Supp. 454 (S.D.N.Y. 1973).

1/ The facts in the Beauvil case are fully set forth in the unreported Board decision, Matter of Haitian Refugees, A13 322 344-57, 59-68 (BIA December 3, 1963).

The applicants claim that not to allow them to be heard in deportation proceedings is a violation of due process under the Fifth Amendment of the United States Constitution. Similarly, they assert that it is a violation of their rights to due process and equal protection of the laws under the Fifth and Fourteenth Amendments for the immigration judge to refuse to hear their persecution claims. They insist further that their exclusion and subsequent deportation to Haiti would constitute cruel and unusual punishment, and would violate their rights under the Eighth Amendment of the United States Constitution. These claims were advanced in order to preserve them in the event that appeal to the courts should become necessary. The applicants acknowledge that it is not within the province of this Board to pass upon the constitutionality of the statutes we administer, Matter of L-, 4 I&N Dec. 556, 557 (BIA 1951).

Congress has provided that a hearing be given to those whose right to enter is in dispute, sections 235(b) and 236, Immigration and Nationality Act. We have determined that the hearing held before the immigration judge in the present case was fairly conducted. We agree with the decision of the immigration judge that the proceedings were properly in exclusion, and that he was therefore without jurisdiction to hear the persecution claims under section 243(h).

Counsel has requested that the case be certified to the Attorney General pursuant to 8 C.F.R. 3.1(h). We see no reason for certification and therefore deny counsel's request.

ORDER: The appeal is dismissed.